Supreme Court, U.S.
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No. 93-1479

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1993

CRUTTENDEN & COMPANY, TALLEY MCNEIL & COMPANY, INC.
SUTRO & CO., INC., ROBERT C. CARTY, JR.,
SUN LIFE ASSURANCE COMPANY OF CANADA,
SUN FINANCIAL GROUP, LOOMIS & SAYLES & CO.,
DOES 1 THROUGH 100, INCLUSIVE,
Petitioners,
VS.
ROBERT A. LYNCH, BETTY LAVERNE LYNCH, individually
and TRUSTEES OF THE ROBERT A. LYNCH AND
BETTY LAVERNE LYNCH FAMILY TRUST DATED MAY 30, 1979
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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TRUST DATED MAY 30, 1979

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The Petition for Writ of Certiorari presented by CRUTTENDEN & COMPANY, TALLEY McNEIL & COMPANY, INC., SUTRO & CO., INC. and ROBERT C. CARTY, JR. should be denied.

STATEMENT OF THE CASE

I.

FACTS

The Petition for Writ of Certiorari correctly presents to this Court the Orders of the Superior Court of the State of California for the County of Ventura (Petition Appendix 1A-4A), the Decision of the Second District Court of Appeal for the State of California officially reported at 18 Cal.App.4th 804 (1993) (Petition Appendix 5A) and the Order of the California Supreme Court unanimously denying the Petition for Hearing, the Honorable Malcom Lucas, Chief Justice speaking for the Court (Petition Appendix 14A).

The Facts as presented by Petitioners herein are inaccurate. The accurate *evidentiary* facts are as follows:

Respondent ROBERT A. LYNCH (hereinafter referred to as ROBERT), born November 26, 1929 (Appendix 1A)[1] attended school only to the ninth grade, never graduating high school, never attending college, and never obtaining any degrees or special training from any institutions of higher learning (Appendix 1A). His wife, Respondent BETTY LAVERNE LYNCH (hereinafter referred to as **BETTY**), born May 9, 1930 (132), graduated high school in 1948 and never attended any college. After high school she briefly attended a trade school to learn shorthand and typing (Appendix 8A).

Neither **ROBERT** nor **BETTY**, prior to the events which give rise to the instant litigation had ever had a securities account at any brokerage house or any other institution. (Appendix 1A). Indeed, neither **ROBERT** or **BETTY**, prior to meeting MR. CARTY, ever had executed any stock

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[1]In the Appendix attached hereto, Respondents present to this Court the evidentiary record supporting the factual statement herein.

broker agreements, brokerage house agreements, or any other agreements of the type alleged to exist by the Appellants in the instant matter. (Appendix 1A).

ROBERT first met Defendant/Appellant MR. CARTY in 1988 while purchasing a used car from MR. CARTY'S brother in Santa Barbara. (Appendix 1A) MR. CARTY struck up **ROBERT'S** friendship. MR. CARTY told **ROBERT** he was related to many well-established multi-generational Ventura County families with whose names **ROBERT** was familiar. MR. CARTY explained that his grandfather was a close associate and personal friend of Martin Smith, the well-known Oxnard developer. MR. CARTY also told **ROBERT** that he was married to the daughter of Mr. Ted Engs of Engs-Peterbilt — another well-established Ventura and Los Angeles County family.[2] [Appendix 2A]. As the close and personal relationship between **ROBERT** and Mr. CARTY developed and grew, MR. CARTY did not initially discuss anything having to do with managing or investing the funds or properties of **ROBERT** and **BETTY.** Instead, he concentrated on be coming a close personal friend of **ROBERT.** (126) MR. CARTY would come by **ROBERT'S** office or house as often as two (2) times per week, take **ROBERT** to lunch regularly at the Tower Club at the top of the Union Bank Building in Oxnard, where they would sit at what MR. CARTY described as "Mr. Smith's private table". (Appendix 2A).

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[2]The nature of the development of the relationship between **ROBERT** and MR. CARTY is significant because unlike any of the cases presented by Petitioners, the instant matter is *not* a circumstance where Respondents went to a securities brokerage house to seek their assistance, advisement or services. In the instant matter, as set forth in the Declaration of Robert A. Lynch (commencing Appendix: 2A), **ROBERT** and **BETTY** were approached by MR. CARTY after first establishing a close and intimate personal relationship.

In the course of the many personal and intimate conversations between MR. CARTY and **ROBERT, ROBERT** told MR. CARTY that he had no experience in stocks, bonds, mutual funds, or any other kind of activity that MR. CARTY would from time to time describe. (Appendix 3A) **ROBERT** told MR. CARTY during these conversations that he did not understand most, if not all, of what MR. CARTY would describe as his business. MR. CARTY often stated to **ROBERT** that managing money safely was "his business" and that's what he was an "expert in". (Appendix 3A).

In the context of the close friendship that MR. CARTY nurtured and developed with **ROBERT** over several years, **ROBERT** started confiding with MR. CARTY that he was thinking of selling the cement business he had built from scratch (Appendix 3A), paying the taxes on the sale and retiring with the money that was left in safe investments for he and his wife and ultimately their children. (Appendix 3A) MR. CARTY, in the context of their close friendship, became very solicitous of **ROBERT**, increasing the friendship and trust that had already been established between them. [3] (Appendix 3A).

Finally, the business was sold, and the taxes paid. **ROBERT** told his friend, MR. CARTY, about the sale and at that time MR. CARTY asked **ROBERT**, as a friend, to become the personal manager of the funds for **ROBERT** and **BETTY**, and their family. (Appendix 3A) When MR. CARTY first broached the subject with his friend, **ROBERT**, about becoming the family's manager of the

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[3]During the several years where MR. CARTY nurtured the friendship and trust between he and **ROBERT**, at no time were there any business relationships between the two. At no time were there any securities accounts opened or investments made. In other words, the relationship was created and nurtured by MR. CARTY, on its face, to be that of true close friends with great trust in each other.

funds, MR. CARTY repeated and affirmed his friendship and trust with and from **ROBERT** and **BETTY**, and that **ROBERT** and **BETTY** should rely upon that trust and friendship, as well as MR. CARTY'S expertise and management skills. (Appendix 4A). [4]

In the context of the close and trusting friendship nurtured and developed by MR. CARTY over several years with **ROBERT**, and MR. CARTY'S suggestion to **ROBERT** that he (MR. CARTY) could and should take care of the family retirement, MR. CARTY came to **ROBERT** and **BETTY** and told them that he needed some "form" documents signed in order to open the accounts so he could handle the safe management of the funds. (Appendix 4A). At this time, MR. CARTY told **ROBERT** and **BETTY**, who he knew had never seen documents like this before and had never had any kind of securities account, that the documents were "standard" and "simply a formality"; and, that they were not necessary to read because they "simply effected an opening of the account and the transference of the funds to him". (Appendix 4A). At the time of the presentation of the documents, and in accordance with the long, continuing, trusting relationship

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[4]The Court's attention is respectfully directed to the Declaration of Robert A. Lynch (Appendix: 1A) and the Declaration of Betty Laverne Lynch (Appendix: 8A). This Statement of Facts while highlighting certain key issues cannot give the feeling for the declaration itself which makes clear that over the course of several years, and before MR. CARTY ever broached the subject of becoming the family investment counselor for **ROBERT** and **BETTY**, MR. CARTY nurtured a very close friendship and trusting relationship between he and **ROBERT**. It is this trusting friendship, nurtured by MR. CARTY, that formed the basis of **ROBERT** and **BETTY'S** willingness to accept MR. CARTY'S suggestion, as their close friend, to manage their money for retirement and for the children. It is also in this context, this close and trusting pre-existing friendship, that the comments of MR. CARTY and his instructions in regard to signing documents, must be measured.

that had been developed, MR. CARTY repeatedly stressed that he could be trusted and that his friends, **ROBERT** and **BETTY**, did not need to read the documents because they were "simply a formality". (Appendix 5A).[5]

When MR. CARTY told **ROBERT** and **BETTY** to sign the documents, MR. CARTY never advised **ROBERT** and **BETTY** that the documents constituted a "contract" addressing the rights and responsibilities of the parties (Appendix 5A). Indeed, there was a very specific conversation that **ROBERT** remembers with absolute clarity concerning certain of the documents at issue:

> "CARTY: These are documents I need for you to sign so I can manage your money for you. Don't worry about the documents, they're formalities, just go ahead and sign them.
>
> (**ROBERT/BETTY**): Okay — We trust you.
>
> **ROBERT** (jokingly): I hope I'm not signing my life away.
>
> CARTY (laughing): No — They're just a formality, they're not important." (Appendix 6A).

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[5]While previously stated, it is important to emphasize that MR. CARTY knew and had been told in the context of the close, personal relationship he had developed and nurtured with **ROBERT**, that **ROBERT** had never had any experience with any securities brokers or any securities transactions whatsoever and that he had never seen any documents such as these before. (Appendix: 4A). Each time MR. CARTY needed some documentation signed he would personally bring it to **ROBERT** and **BETTY**, reiterate the closeness of the pre-existing friendship and advise he simply needed a "signature" on a "standard" document as a "formality". (Appendix: 5A).

There was *no* evidence presented by Petitioners contradicting the facts as presented by **ROBERT** and **BETTY** in their respective declarations. Thus, it is undisputed that:

(1) MR. CARTY solicited, nurtured and developed a close, personal, intimate, and trusting relationship with **ROBERT** for several years *before* there was ever any execution of brokerage account documents;

(2) MR. CARTY was, in fact, a close and intimate confidante and personal friend who solicited and received **ROBERT** and **BETTY'S** trust and confidence long before he presented any documents for them to sign;

(3) MR. CARTY advised **ROBERT** and **BETTY** that the brokerage account documents that he asked them to sign were "not important" and were "not a contract"; and,

(4) As a result of the malfeasance of MR. CARTY and the various brokerage houses with whom he worked, the losses of **ROBERT** and **BETTY** have exceeded One and One Half Million Dollars ($1,500,000.00) (Appendix 6A), while at the same time MR. CARTY and the brokerage houses for whom he worked have earned commissions on Respondents' accounts in excess of One Million Dollars ($1,000,000.00) (Appendix 6A).

From the mid-1980's, the securities industry (brokerage houses) has, as an industry, effectively sought to foreclose access to courts and juries by no matter how egregious the conduct or great the harm. There has been a clear and unequivocal industry-wide attempt to simply preclude access to the courts by anyone with respect to any claim involving a brokerage house. These efforts have now reached the point where it is virtually impossible to have any kind of brokerage account without the documentation having buried within it, somewhere, an arbitration clause requiring all disputes, of any nature or type, to go before a securities industry panel in a binding fashion.

The most recent data that could be obtained in the context of the brokerage industry was as of January 1, 1989 which indicated that there were 3551 retail offices for brokerage firms in the United States. (Appendix 10A). Of those retail outlets, 2933 were of the top six brokerage houses: Dean Witter, Shearson-Lehman, Merrill-Lynch, A.G. Edwards, Prudential-Bache, Paine Webber, and Oppenheimer. Thus, eighty-seven and one-half percent (87½%) of the total retail brokerage houses as of January 1, 1989, were owned and operated by the largest six brokerage houses. (Appendix 11A). In regard to the number of registered representatives (stock brokers), as a statistic distinct from the number of stock brokerage offices, the statistics indicated that as of January 1, 1989 the total number of brokers in the United States was 58,383 with 46,170, or 79.08%, being in those same six brokerage houses above-referenced. (Appendix 11A). Each one of those brokerage houses, which control almost 90% of the brokerage house business in the United States inserts a mandatory binding arbitration clause almost identical to that in the instant matter. (Appendix 14A). Thus, an entire industry has joined together to attempt to preclude access to the courts for any of its customers.[6]

After learning of the malfeasance of the Defendants, **ROBERT** and **BETTY** filed their Complaint alleging nine causes of action. In that Complaint **ROBERT** and **BETTY** allege, inter alia, that MR. CARTY was their intimate friend and through that friendship they developed and reposed substantial trust and confidence in him; that MR. CARTY encouraged and solicited the trust and confidence of them and in that context, and after he had established the friendship and the close personal relationship, engaged in the activities that are the subject of the

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[6]Neither the Trial Court nor the Court of Appeal relied upon this ground to deny the Petition to Compel Arbitration.

Complaint that from time to time, and in the context of this close personal friendship and trust that pre-existed the activities which form the basis of the Complaint, MR. CARTY instructed them to sign various documentation which was "simply necessary to effect the continuing reliance and trust by Plaintiffs and Defendant CARTY"; that MR. CARTY specifically advised them in the context of having them sign certain documents and in the context of the continuing relationship of trust and confidence, that the documents did "not affect legal rights", that it was "not necessary that they be read", and, that they were "not provided any substantial opportunity to read any such documents", nor were they "advised of any contents thereof"; that at the time of the various meetings between they and MR. CARTY where documents were requested to be signed, MR. CARTY specifically represented in the context of their pre-existing relationship of trust and confidence that the documents "did not affect legal rights and it was not necessary to read them", that the documents were "only a formality" and that **ROBERT** and **BETTY** relied upon these representations by MR. CARTY and reposed their trust and confidence in him because of their pre-existing relationship; that these representations by MR. CARTY were false; that MR. CARTY knew them to be false and that they were made with the intent to deceive and defraud **ROBERT** and **BETTY** and to induce them to act in the manner alleged; and, that they were ignorant of the falsity of MR. CARTY'S representations and believed them to be true and in reliance upon his representations, did act in accord with his requests including the signing of the documentation and the transference of their retirement money to him.

The *facts* are as delineated above. At no time have Petitioners ever disputed, under oath, any of the facts set forth. They present no contrary *evidence* to this Court, nor have they to any other Court.

ARGUMENT

I.

THE DECISION OF THE CALIFORNIA COURTS ARE CORRECT

The decision of all three levels of California Courts (Superior, Court of Appeal and Supreme) are predicated on the undisputed facts set forth above. Unlike any case cited by Petitioners, the instant matter involves a circumstance of a pre-existing fiduciary relationship where Respondents were solicited by Petitioners. The record contains ample factual support for the unanimous California Court findings of fraud in the inducement of the arbitration agreement; a fraud that also exists with the balance of the relationship. As enunciated by the Second District Court of Appeal:

> "That the misrepresentation may go to some or even all of the clauses of the contract as well as the arbitration clause does not mean that fraud in the making of agreement for arbitration is not in issue. PRIMA PAINT does not stand for the proposition that a fraudulently induced arbitration agreement becomes valid and enforceable if the fraud also goes to other parts of the contract. PRIMA PAINT simply interpreted section 4 of the Act as requiring the arbitration provision of the contract to be treated as a separate agreement for the purpose of determining whether it is enforceable.
>
> The fraud alleged in PRIMA PAINT concerned misrepresentation of a party's financial condition. In contrast to the instant case, there was no allegation in PRIMA PAINT that a party was misled as to the existence or effect of the arbitration clause. Here, it is alleged that the parties were misled as to the very existence of the arbitration clause." (18 Cal.App.4th 802, 810).

The California Courts have thus unanimously held that Respondents herein have presented uncontroverted evidence of fraud in the inducement in the arbitration agreement. Petitioners have not once presented any evidence to the contrary. Ample evidence exists in the record to support the determination of the California Courts.

Since the determination of all three levels of California Courts were based on uncontroverted evidence, the true thrust of the Petition is simply a request to have this Court review evidence or review inferences drawn from that evidence. This Court properly denies certiorari in such a circumstance *(General Talking Pictures Corp. v. Western Electric Co.* (1938) 304 U.S. 175, adhered to in 305 U.S. 124, reh den 305 U.S. 675; *NLB v. Pittsburgh SS Co.* (1951) 340 U.S. 498).

II.

THE DECISION OF THE CALIFORNIA COURTS ARE NOT "FINAL" AND ANY DETERMINATION BY THIS COURT WOULD BE PREMATURE

Petitioners contend that the issue of arbitration has been conclusively determined against them by the California Courts. That conclusion is simply in error. The first sentence of the Discussion portion of the Opinion of the California Court of Appeal is as follows:

> "Our task on appeal is simply to determine whether the Plaintiffs have alleged in their complaint and affidavits sufficient facts to warrant a trial on the validity of the arbitration agreement. (Citations omitted)" (18 Cal.App.4th 802, 805).

The Petition to this Court does not follow a final determination either in favor of or denying arbitration; nor is it a Petition following an evidentiary hearing.

Unless Petitioners are prepared to accept the state of the evidence as uncontroverted, then Petitioners must acknowledge that procedurally they have been granted the right by all three levels of the California Courts to an evidentiary hearing on the issue of fraud in the inducement (9 U.S.C. Section 4). That Petitioners have this right is supported by the California authorities *(Strotz v. Dean Witter Reynolds, Inc.* (1990) 223 Cal.App.3d 208, ftnt 2 cited with approval by the Court of Appeal in the instant matter.

This Court has previously determined that California law in regard to addressing procedures of implementation of arbitration, even under the Federal Arbitration Act is proper; and that this Court will defer to the implementation of the arbitration procedures under California law in such a circumstance *(Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. University* (1989) 489 U.S. 468). Unless Petitioners are prepared to concede the uncontroverted evidence, a concession they do not make in their Petition, then Petitioners must concede that their Petition is premature since the evidentiary hearing contemplated under 9 U.S.C. Section 4 and its implementation in California pursuant to *Strotz,* supra, and *Main v. Merrill Lynch Pearce Fenner & Smith, Inc.* (1977) 67 Cal.Ap.3d 19, 24 has not yet occurred nor has it yet been requested by Petitioners.

III.

THE CASES CITED TO SUPPORT THE PETITION ARE DISTINGUISHABLE

Each and every case cited by Petitioners to support their Petition have at their core an arms length, non fiduciary, business relationship. As enunciated by the Court in *Cohen*

v. Wedbush Noble Cooke, Inc. (9th Cir. 1988) 841 F.2d 282:

> "We know of no case holding that parties *dealing at arms length* have a duty to explain to each other the terms of a written contract. We have declined to impose such an obligation . . ." (Id at page 287) (Cited by the Court of Appeal in the instant matter at 808. (Emphasis Added).

The Federal Arbitration Act does not pre-empt the totality of state law. (*Volt,* supra). While this Court has recognized a national policy favoring arbitration (*Southland Corp. v. Keating* (1984) 465 U.S. 1), this Court likewise has determined that enforceability of arbitration provisions governed by the Federal Arbitration Act does not exist if grounds for revocation 'exist at law or in equity for the revocation of any contract'. (*Southland Corp. v. Keating,* supra). The California Courts have held that the relationship of the parties such as in the instant matter are not "arms length" but instead are in the nature of fiduciary relations and governed by those substantive rules (*Strotz,* supra; *Main v. Merrill Lynch Pearce Fenner & Smith, Inc.* (1977) 67 Cal.App.3d 19; *Twomey v. Mitchum Jones and Templeton, Inc.* (1968) 262 Cal.App.2d 690; *O'Neil v. Spillane* (1975) 45 Cal.App. 2d 147).

As stated in *Main,* supra:

> "When a fiduciary enters into a transaction with a beneficiary whereby the fiduciary's position is improved, or he obtains a favorable opportunity, or whether he otherwise gains, benefits, or profits, it may fairly be said that an advantage has been obtained (Citations omitted) . . . It is the settled law of this state, and elsewhere, that where there exists a relationship of trust and confidence, it is the duty of one in whom the confidence is reposed to make full disclosure

> of all material facts within his knowledge relating to the transaction in question and any concealment of material fact is fraud. (Citations omitted) Where there is [such] a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud sufficient to entitle the party injured thereby to an action." (Citations omitted) (Id, 67 Cal.App.3d at 31-32)

While acknowledging *Prima Paint v. Flood and Conklin* (1967) 388 U.S. 395 (not a stockbroker/fiduciary relationship case but rather an arms length business transaction), the Court in *Main,* supra, made clear that where there is a confidential/fiduciary relationship, then those rules will govern the transaction. In the instant matter, the undisputed facts are that such a confidential/fiduciary relationship existed, not just as a matter of California law but as a factual matter as between the parties. The Court of Appeal in the instant matter makes clear that the nature of that relationship, and indeed its existence, is what Petitioners are entitled to have presented to a jury, should they choose, in determining whether or not the arbitration clause is to be enforced. As stated by the Court of Appeal in the instant matter:

> "In *Cohen* the court assumed the parties were dealing at arms length. The case did not discuss whether *Wedbush* was acting in a fiduciary capacity. Where a person reposes trust and confidence in another and the person in whom confidence is reposed obtains control over the other persons' affairs, a fiduciary relationship is created (citations omitted). Here the Lynches allege that Carty obtained control over their funds through the trust and confidence they reposed in him as a friend and a purported expert in investments. The Lynches also alleged that Carty was acting as the agent of Cruttenden and Sutro. This is sufficient to allege that the

> Defendants were acting in a fiduciary capacity." (Id at 808-809).

Thus, the uncontroverted evidence supports the finding and inferences of the confidential and fiduciary relationship. Not one single case cited by Petitioners herein arises out of, addresses, or concerns such a relationship.

IV.

CALIFORNIA STATE LAW IS NOT TOTALLY PRE-EMPTED BY THE FAA AND AN INDEPENDENT STATE GROUND EXISTS FOR THE CALIFORNIA DETERMINATION

This Court has previously held that the Federal Arbitration Act is not all inclusive and all pre-emptive. (*Volt Information Services, Inc.,* supra) In accord are the California cases (*Ford v. Shearson Lehman/American Express, Inc.* (1986) 180 Cal.App.3d 1011; *Rice v. Dean Witter Reynolds, Inc.* (1991) 235 Cal.App.3d 1016; *Main v. Merrill Lynch Pearce Fenner & Smith, Inc.,* supra), all citing with approval *Southland v. Keating,* supra, where this Court stated:

> "Such clauses may be revoked upon grounds as exist at law or in equity for the revocation of any contracts."

The three levels of California Courts in the instant matter unanimously have determined that under California law sufficient uncontroverted factual allegations have been presented so as to require an evidentiary proceeding to determine the existence and nature of the fiduciary and confidential relationship and fraud therein as to the arbitration agreement. (Petition Appendix 10A-11A) This finding is in accord with the Federal Arbitration Act and this Court's determinations in *Southland,* supra, and *Perry v. Thomas* (1987) 482 U.S. 483, 493, ftnt 9. No federal cases have been presented by Petitioners to the contrary, and the

area of law not being universally and completely pre-empted by the Federal Arbitration Act, the California Courts have properly applied state substantive law concerning fiduciary and confidential relationships. These findings are properly left intact. This Court from the time of its foundation has adhered to the principle that it will not review judgments of state Courts that rest on adequate and independent state grounds. (*Herb v. Pitcairn* (1945) 324 U.S. 117; *Williams v. Georgia* (1955) 349 U.S. 375; *Wolfe v. North Carolina* (1960) 364 U.S. 177; *Henry v. Mississippi* (1965) 379 U.S. 443).

V.

ADDITIONAL ISSUES

If this Court grants the Petition, it is respectfully requested that this Court consider the following additional issues:

A. WHETHER THE UNILATERAL IMPOSITION OF ARBITRATION CLAUSES IN THE SECURITIES INDUSTRY HAS BECOME UNCONSCIONABLE.

When this Court originally considered arbitration clauses in the securities industry, the provisions for arbitration and their implementation were in an embryonic stage. Now, the requirements of arbitration are near universally contained in Securities Industry standard preprinted forms. In its headlong rush to eliminate the ability of the American public to have access to Court's of law, the securities industry, which controls the financial heart of this country has unilaterally mandated securities industry controlled and implemented arbitration.[7]

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[7] See 27 Willamette Law Review (Summer 1991) 69 ftnt 50 stating that the results of their informal survey revealed one hundred percent (100%) of the leading brokerage houses polled require pre-dispute

California Courts have held that such standardized contracts, imposed and drafted by a party of superior bargaining strength (clearly existing in the instant matter and now existing on an industry wide basis to the entirety of the population of this country) constitute adhesion contracts *(Neal v. State Farm Insurance Companies* (1961) 188 Cal.App.2d 690, 694) and have further held that if unconscionable then they are unenforceable unless there is a meaningful choice of reasonably available alternative sources of supply *(Dean Witter Reynolds v. Superior Court* (1989) 211 Cal.App.3d 758). This issue was presented by Respondents at the trial Court, Court of Appeal and Supreme Court. None of the California Courts have reached the issue because they determined the Petitions to Compel Arbitration were properly denied factually, there being no substantive evidence in opposition thereto, pending a full evidentiary hearing. If this Court accepts the Petition, it is requested that this Court visit the issue of whether or not the pervasiveness of the unilaterally imposed and drafted arbitration clauses by the entirety of the securities industry constitute adhesion contracts that now are properly required to be conscionable both in their imposition and terms.

Securities Industry arbitration agreements in order to open new margin accounts. The undisputed record before the trial court in the instant matter is that in excess of ninety percent (90%) of all brokerage houses actually surveyed in 1989 have the standard industry arbitration provisions within their account documentation. This fact is further borne out by the failure of Petitioners, at the trial Court level, the Court of Appeal level, the California Supreme Court level, or indeed, in their Petition, to even suggest that there are meaningful alternatives available to the public. A member of the public cannot buy stocks or bonds without signing provisions eliminating rights to trial in a Court of law.

B. WHETHER OR NOT THE SECURITIES INDUSTRY IMPOSED ARBITRATION HAS BECOME UNCONSCIONABLE IN ITS IMPLEMENTATION.

When this Court visited the issue of securities arbitration and embraced it generally, the evidence did not exist, nor had there been any studies as to what was actually occurring in the securities arbitration proceedings. There have since been studies, both formal and informal, concerning the fairness, legitimacy and efficacy of the industry sponsored and controlled customer arbitration process. In the instant matter, since the Petition to this Court is premature, no evidentiary record has yet been made though the issue has been presented by Respondents from inception of the proceedings.[8]

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[8]In this regard, a recent article in the Los Angeles Times Business Section, Section D, on November 8, 1993 discussed the securities arbitrations and noted that the particular brokerage firm (Prudential Securities) was "making false statements to arbitrators, refusing to produce documents and postponing or drawing out hearings to increase the legal expenses of customers" and importantly:

> "The incidence show the flaws inherent in any customer arbitration case involving a brokerage firm. Debra Masucci, the head of the National Association of Securities Dealers confirmed that **THERE IS NO NASD RULE THAT PROHIBITS FIRMS FROM MAKING FALSE STATEMENTS IN ARBITRATION CASES.** She said that although such conduct could be considered a violation of the NASD's general ban on unfair conduct, she said she believes no such case has ever been brought." (Emphasis added).

As referenced in the article, one of the firms involved in representing Prudential Securities, the brokerage firm which may have made false or incorrect statements to the Arbitration Panel is the firm of Keesal, Young & Logan, counsel for Petitioners herein. Additionally, there have been federal studies concerning arbitration by the United States General Accounting Office including the May 19, 1992 concerning Securities Arbitration and Investors (GAO/GGD 92-71, May 11, 1992) and the study of employment discrimination and how registered representatives fare in industry controlled arbitration (GAO/HEHS-94-17 Employment Discrimination, March 30, 1994). Both studies delineate signifi-

VI.

CONCLUSION

For the above stated reasons it is respectfully submitted that the petition be denied.

DATED: June 8, 1994

Respectfully submitted,

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cant flaws in the arbitration process, flaws inuring to the benefit of the securities industry and the brokerage firms.